ABDOL RAHIM ZAMANI MOHAMMAD ALI v. PP

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
ROHANA YUSUF JCA
TENGKU MAIMUN TUAN MAT JCA
[CRIMINAL APPEAL NO: B-05-82-03-2012]
27 AUGUST 2015

EVIDENCE: *Exhibits – Identity of exhibits – Offence of drug trafficking – Challenge as to identity of drugs – Allegation of discrepancy in weight and break in chain of evidence – Whether discrepancy in weight per se sufficient ground to discredit drug identity – Whether break in chain of evidence proven – Whether challenge as to identity of drugs misplaced*

CRIMINAL PROCEDURE: *Judge's notes of evidence – Record of proceedings – Discrepancies in notes of proceedings by trial judge with court recording transcription – Whether trial judge responsible for accuracy of notes of proceedings – Whether there was a misdirection by trial judge – Whether defence case prejudiced – Criminal Procedure Code, ss. 272, 272C & 272F*

The appellant was charged and convicted under s. 39B(1) of the Dangerous Drugs Act 1952 ('DDA') and was sentenced to the mandatory death sentence. In finding the appellant guilty of the charge, the trial judge found the evidence of the appellant to be inconsistent and his defence of innocent carrier unacceptable. The appellant had also failed to raise any reasonable doubt on the prosecution's case. In the present appeal, the appellant challenged the identity of the drugs wherein it was contended that there was unexplained discrepancy in weight and a break in the chain of evidence when there was no explanation as to where the drugs were kept for 22 days before it was sent to the chemist. The appellant further contended that the trial judge had misdirected himself in appraising the defence case because the trial judge had relied on the wrong notes of proceedings.

Held (allowing appeal in part; setting aside order of High Court and substituting it with a conviction on charge under s. 39A(2)(r) of DDA; sentenced to 18 years imprisonment and ten strokes of whipping)
Per Rohana Yusuf JCA delivering the judgment of the court:

(1) Discrepancy in weight *per se* is not a sufficient ground to discredit the drug's identity so long as there is no break in the chain of evidence. On the facts, although there was no explanation on the discrepancy in the gross weight of the drug exhibits, there was also no break in the chain of evidence. The same drugs that were seized and were marked accordingly were identified by all the relevant parties handling them. The substance that was analysed by the chemist was proven to be the same drugs seized from the appellant. (paras 15 & 16)

(2) The challenge as to the identity of the drugs was misplaced since the appellant had never raised any issue as to where the drugs were kept and did not suggest that there was meddling of the drugs by the chemist. The appellant also had never raised the issue of whether the drug exhibits were the same as the one seized from him. When no doubt existed on the identity of the drugs and where no challenge was made by the appellant, it would not be essential for the prosecution to show how the investigating officer kept the drug exhibits before sending them to the chemist. (para 18)

(3) There were discrepancies between the notes of proceedings by the trial judge with the recording of the notes in the court recording transcription ('CRT'). The trial judge's treatment of the defence case had been tainted with his finding that the appellant lacked credibility for being inconsistent on a wrong fact because he had relied on the wrong notes of proceedings. Had the trial judge correctly directed himself and relied on the correct notes of proceedings, he would have looked at the defence case differently. (paras 22-23 & 25)

(4) Section 272 of the Criminal Procedure Code ('CPC') stipulated that a presiding judge was duty bound to note and record evidence including demeanour of witness, if necessary. With the introduction of the electronic CRT, s. 272C of the CPC was introduced to allow mechanical means of recording evidence. Under s. 272F of the CPC, the mechanically recorded proceedings may be transcribed by a person authorised by the judge. Once the transcriber produced the record, the judge shall ascertain the accuracy and reliability of the transcription. There cannot be two different sets of record of proceedings. Had the trial judge abide by the provisions of s. 272F of the CPC, the present irreconcilable difference in the notes of proceedings would not have arisen. (paras 27 & 28)

(5) Be it by an electronic device or hand written recording, the trial judge remains responsible for the accuracy of the notes of proceedings before him. The failure of the judge to ensure the accuracy of the recording had prejudiced the appellant's case and the failure was a breach of the provision under s. 272F of the CPC. However, although a misdirection had occurred, it was not in itself a sufficient ground to justify interference with the verdict. (paras 29 & 31)

(6) Despite sufficient evidence that there was possession and that knowledge was presumed under s. 37(d) of the DDA, it would not be safe to convict the appellant on the original charge of trafficking with his defence being put in jeopardy. This was therefore an appropriate case to substitute it with a conviction of possession under s. 39A(2) of the DDA. (para 32)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah dipertuduh dan disabitkan di bawah s. 39B(1) Akta Dadah Berbahaya 1952 ('ADB') dan telah dijatuhkan hukuman mandatori mati. Dalam memutuskan bahawa perayu bersalah terhadap pertuduhan tersebut, hakim bicara mendapati bahawa keterangan perayu tidak konsisten dan pembelaannya sebagai pembawa tidak bersalah juga tidak boleh diterima. Perayu juga telah gagal membangkitkan apa-apa keraguan munasabah terhadap kes pihak pendakwaan. Dalam rayuan ini, perayu telah mencabar identiti dadah di mana dihujahkan bahawa terdapat percanggahan yang tidak dijelaskan berkenaan berat dan pemutusan dalam rangkaian keterangan di mana tiada penjelasan diberikan tentang tempat di mana dadah tersebut disimpan selama 22 hari sebelum ia dihantar kepada ahli kimia. Perayu selanjutnya menghujahkan bahawa hakim bicara telah tersalah arah dalam penilaian kes pembelaan kerana hakim bicara bersandarkan kepada nota prosiding yang salah.

Diputuskan (membenarkan sebahagian rayuan; mengetepikan perintah Mahkamah Tinggi dan menggantikan dengan sabitan atas kesalahan di bawah s. 39A(2)(r) ADB; menjatuhkan hukuman penjara 18 tahun dan sepuluh kali sebatan)

Oleh Rohana Yusuf HMR menyampaikan penghakiman mahkamah:

(1) Percanggahan dalam berat semata-mata bukan alasan yang mencukupi untuk meragui identiti dadah tersebut selagi tidak ada pemutusan dalam rangkaian keterangan. Atas fakta, walaupun tiada penjelasan bagi percanggahan dalam berat kasar ekshibit dadah, tidak ada juga pemutusan dalam rangkaian keterangan. Dadah sama yang telah dirampas dan ditandakan sewajarnya telah dikenal pasti oleh kesemua pihak relevan yang mengendalikannya. Bahan yang dianalisa oleh ahli kimia telah dibuktikan sebagai dadah sama yang dirampas daripada perayu.

(2) Cabaran mengenai identiti dadah tersebut adalah salah tanggapan kerana perayu tidak pernah membangkitkan apa-apa isu mengenai di mana dadah tersebut disimpan dan tidak pernah mencadangkan bahawa dadah tersebut diusik oleh ahli kimia. Perayu juga tidak pernah membangkitkan isu sama ada ekshibit dadah tersebut adalah dadah sama yang dirampas daripadanya. Apabila tiada keraguan wujud berkaitan dengan identiti dadah dan tiada cabaran dibangkitkan oleh perayu, adalah tidak penting bagi pihak pendakwaan menunjukkan bagaimana pegawai penyiasat telah menyimpan ekshibit dadah tersebut sebelum menghantarnya kepada ahli kimia.

(3) Terdapat percanggahan dalam nota prosiding oleh hakim bicara dengan yang rekod nota dalam rekod transkripsi mahkamah ('CRT'). Pertimbangan hakim bicara terhadap kes pembelaan telah dicemari dengan dapatannya bahawa perayu tiada kredibiliti atas alasan tidak

konsisten atas fakta yang salah kerana beliau telah menyandar atas nota prosiding yang salah. Jika hakim bicara mengarah dirinya dengan betul dan bersandar pada nota posiding yang betul, beliau akan mempertimbangkan kes pembelaan dengan berbeza.

(4) Seksyen 272 Kanun Tatacara Jenayah ('KTJ') memperuntukkan bahawa hakim yang bersidang terikat untuk mengambil nota dan merekodkan keterangan termasuk kelakuan saksi, jika perlu. Dengan pengenalan CRT elektronik, s. 272C KTJ diperkenalkan untuk membenarkan cara merekodkan keterangan secara mekanikal. Di bawah s. 272F KTJ, prosiding yang direkodkan secara mekanikal boleh ditranskripsi oleh seseorang yang diberi kuasa oleh hakim. Apabila seseorang yang mentranskripsi mengemukakan rekod, hakim perlu menentukan ketepatan dan kebolehpercayaan transkripsi tersebut. Tidak boleh ada dua set rekod prosiding yang berbeza. Jika hakim bicara telah mematuhi peruntukan s. 272F KTJ, percanggahan yang tidak selaras dalam nota prosiding tidak mungkin berbangkit.

(5) Sama ada melalui alat elektronik atau direkodkan secara tulisan tangan, hakim bicara kekal bertanggungjawab untuk memastikan ketepatan rekod di hadapannya. Kegagalan hakim untuk memastikan ketepatan rekod telah memprejudiskan kes perayu dan kegagalan tersebut adalah satu pelanggaran peruntukan di bawah s. 272F KTJ. Tetapi, walaupun salah arahan telah berlaku, ia tidak dengan sendirinya menjadi alasan yang mencukupi untuk mewajarkan campur tangan terhadap keputusan.

(6) Walaupun terdapat keterangan yang mencukupi bahawa wujud milikan dan bahawa pengetahuan telah dianggap di bawah s. 37(d) ADB, adalah tidak selamat untuk mensabitkan perayu atas pertuduhan asal pengedaran berdasarkan pembelaannya yang terancam. Dengan itu, ini adalah kes yang sesuai untuk digantikan dengan sabitan bagi milikan di bawah s. 39A(2) ADB.

Case(s) referred to:
Hasbala Mohd Sarong v. PP [2013] 6 CLJ 945 FC ***(refd)***
Lew Wai Loon v. PP [2014] 2 CLJ 649 FC ***(refd)***
PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
PP v. Munusamy [1980] 1 LNS 63 FC ***(refd)***
Wong Vui Chin v. PP [2011] 3 CLJ 383 CA ***(refd)***
Zaifull Muhammad v. PP & Another Appeal [2013] 2 CLJ 383 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 272C, 272F(3)
Dangerous Drugs Act 1952, ss. 2, 37(d), 39A(2)(r), 39B(1)(a)

For the appellant - Rajpal Singh; M/s Rajpal, Firah & Vishnu
For the respondent - Nurshafini Mustafha; DPP

[Appeal from High Court, Shah Alam; Criminal Trial No: 45A-3-2011]

Reported by S Barathi

JUDGMENT

Rohana Yusuf JCA:

[1] At the High Court in Shah Alam, the appellant was charged and convicted under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (DDA) and was sentenced to the mandatory death sentence under the Act. His appeal came before us on 7 November 2014. By a unanimous decision we have allowed the appeal in part. We now give our reasons for our decision.

The Prosecution's Case

[2] On 31 August 2010 at 9am, D/Sjn/M Ghazali Md Zin (SP4) together with other police personnels were making surveillance at the KLIA. Upon the arrival of flight QR 620, SP4 saw the appellant looking suspicious. As soon as the appellant walked towards the exit door, SP4 approached the appellant, introduced himself and asked the appellant to produce his passport.

[3] SP4 together with the appellant then went to the scanning machine. SP4 scanned the bag (exh. P18) which was carried by the appellant. At that point the appellant was seen restless and was described by SP4 as "gelisah, berpeluh dan takut". The scan did not show any suspicious image. Subsequently, SP4 brought the appellant to the narcotic office in KLIA situated on the same floor.

[4] A body search conducted on the appellant found nothing. SP4 inspected (exh. P18) and found personal items belonging to the appellant (exhs. P22 to P31) inside the bag. SP4 detected a bulge on the surface of P18, unscrewed the surface and cut the fabric and found inside the bag's compartment a hard cover. SP4 then peeled the hard cover and found white powder and small pieces of white crystals all over the compartment.

[5] SP4 showed the powder and the small white crystal pieces to the appellant and removed them from the bag compartment. SP4 then put the powder and white crystals into three plastic packets (exhs. P9, P11 and P13) and tied them with one rubber band for each packet. SP4 placed his signatures and put the dates as 31 August 2010 on each of the packets.

[6] The appellant and the seized items were brought to IPD Sepang and were handed over to the investigating officer, Inspector Haryati binti Zahrudin (SP5). It was later confirmed by the chemist Dr Vanitha Kunalan (SP1) that the white powder and white crystals were methamphetamine weighing 1478.4g.

[7] At the end of the prosecution's case, the learned trial judge noted that P18 containing the impugned drugs was under the control of the appellant from the time the appellant was arrested. On that reason the learned judge found possession by the appellant and invoked s. 37(d) of the DDA. A case

of trafficking under s. 2 was made out when the judge found that the amount was excessive for own consumption. The appellant was called to enter his defence.

The Defence Case

[8] The appellant maintained that he did not have knowledge about the drugs in P18 because it was given to him by his cousin known as Ali Reza. On oath, he testified said he was a welder earning USD300 to USD500 per month. He left Tehran on 27 August 2010 for Kuala Lumpur *via* Damascus. He went to Ali Reza's house on 26 August 2010, the day before he travelled. When Ali Reza saw a bag pack he was taking with him, Ali Reza told him the bag pack was too small. A small bag would not be good to carry back clothing and shoes that he has to buy in Malaysia. He left his belongings to be packed by Ali Reza. The next day on 27 August 2010 Ali Reza brought P18 to the appellant at Tehran's bus station. Ali Reza also gave the appellant USD 800 and would pay USD 1200 upon his return to Iran. In Malaysia, the appellant said he was first told to go to Royal Hotel and later changed to the Flamingo Hotel, where a person named Rasol Bahrami would meet him. He would also be told by Rasol what type of clothes and shoes to buy. In short, the appellant denied knowledge of the drugs in P18 as he trusted his cousin Ali Reza.

Findings By The Trial Judge

[9] The learned High Court Judge found that the appellant had failed to raise any reasonable doubt on the prosecution's case. In his grounds of judgment the learned judge found the evidence of the appellant to be inconsistent, and his defence of innocent carrier was unacceptable. He had failed to raise any reasonable doubt on the prosecution's case and was found guilty as per the charge.

The Appeal

[10] In his grounds of appeal, the appellant raised a number of issues. However, before us learned counsel for the appellant chose to rely on only two main grounds. First, the appellant challenged the identity of drugs and secondly contended that the learned judge had misdirected himself in appraising the defence case.

Identity Of Drug Exhibits

[11] On the issue of identity, learned counsel submitted that the identity of the drug exhibits had been compromised for two reasons. First there was unexplained discrepancy in weight and a break in the chain of evidence when there was no explanation as to where the drugs were kept by SP4 for a period of 22 days before sending them to the chemist. Learned counsel for the appellant urged the court to note the unexplained discrepancy in the weight

of the drugs. The police report by SP4 in exh. D34, borang bongkar in exh. P16, borang serah menyerah in exh. P17, all state the gross weight of drugs as 2g. The same was stated in POL 31 prepared by the investigating officer (I.O) and acknowledged receipt by the chemist (SP1). However, when the chemist received the three packets of drugs, the gross weight as noted by the chemist was 1,951.2g. There was a difference of 48.8g in the gross weight as stated by the police witness compared with the chemist which remained unexplained.

[12] Learned counsel referred to the decisions by the Federal Court of *Zaifull Muhammad v. PP & Another Appeal* [2013] 2 CLJ 383, *Hasbala Mohd Sarong v. PP* [2013] 6 CLJ 945 and *Lew Wai Loon v. PP* [2014] 2 CLJ 649. All the three cases ruled that the difference in weight alone is not sufficient to hold that there are doubts as to the identity of the drugs. Learned counsel however submitted that there was a break in the chain of evidence in this case when there was no explanation as to where the drugs were kept for the 22 days prior to taking them to the chemist.

[13] Learned counsel drew our attention to the chronology on the movement of the drug exhibits from the date the appellant was arrested at 9.35am on 31 August 2010. SP4 took about an hour to remove the drugs from the bag compartment, then put them into three plastic packets and sent them on the same day at 1pm to the I.O (SP5). SP5 kept the drugs in a cabinet without further marking till the next day on 1 September 2010. After marking then the drugs were put back into the cabinet and the drugs were taken out of the cabinet again on 2 September 2010 for photographing by SP2 (L/Kpl Rozaimy). According to learned counsel, SP5 however did not state in evidence if she had stored the drugs back together with other exhibits after that. SP5 said on 4 September 2010 at about 10.30am another photography session had taken place where a photo fit session was done. The photographs in exhibits P14G, H and I show that the three packets of drug exhibits were kept together with the clothing. That being so, learned counsel submitted that there was no evidence to confirm that the drugs were all the time under the care and control of the I.O during the fitting exercise. Further to that, there was no explanation as to where the drugs were kept after the photo fittings on 4 September 2010. The drugs exhibits were sent to the chemist only on 21 September 2010 and there were 22 days lapse between the photography sessions and the time the drugs were sent to the chemist.

[14] Learned counsel further submitted that the drug exhibits were tied only with rubber bands, and SP4 agreed that they could be tampered because they were not securely tied. All these factors according to learned counsel had compromised the identity of the drug exhibits which formed the *corpus delecti* of the charge.

[15] We agree with learned counsel of the appellant that from the appeal records before us, that there was no explanation on the discrepancy in the gross weight of the drug exhibits. We are also mindful of the decisions by the Federal Court on this issue. All the three decisions of the Federal Court cited to us held one common ground, that discrepancy in weight *per se* is not a sufficient ground to discredit the drug's identity so long as there is no break in the chain of evidence.

[16] We are however in agreement with the learned DPP that on the facts of the case before us, there was no break in the chain of evidence. This is also the findings of the learned judge when he said:

> Mahkamah berpuas hati dan membuat pendapat, rantaian barang kes adalah tidak terputus menurut semua keterangan oleh SP1, SP4 dan SP5. SP4 dalam keterangannya telah memberitahu bahawa barang kes sentiasa dalam kawalannya bermula dari ia dirampas sehingga diserahkan kepada Pegawai Penyiasat (SP5). Tiada siapa selain SP4 yang mengawal dan mengawasi barang kes tersebut sepanjang perjalanan dari tempat kejadian sehingga ke Pejabat Narkotik di IPD Sepang. Apabila sampai di IPD Sepang, barang kes sentiasa dalam jagaan SP4. SP4 telah membuat penandaan pada barang-barang kes yang dirampas sebelum diserahkan kepada SP5. Sejurus selepas penandaan oleh SP5 dia telah menyimpan barang-barang kes tersebut di dalam kabinet besi di dalam pejabatnya dan hanya beliau seorang sahaja yang ada akses kepada kabinet besi tersebut.

[17] It is trite law that, it is not the practice of the appellate court to review factual findings of a trial judge (see *PP v. Munusamy* [1980] 1 LNS 63; [1980] 2 MLJ 133). In this regard we agree with the submission by the learned DPP. As submitted by learned DPP that SP5 was clear in her testimony that all the seized items were handed over to the chemist 2 September 2010 and the exhibits with the same markings were analysed and referred by SP1 as reflected in the chemist report in exh. P6. The same drugs that were seized and were marked accordingly were identified by all the relevant parties handling them. The substance that was analysed by the chemist had been proven to be the same drugs seized from the appellant as testified by SP3, SP4, SP5 and SP7.

[18] Furthermore, at the trial the appellant never raise any issue as to where the drugs were kept. The appellant did not suggest that there was meddling of the drugs by the chemist. In fact the appellant had never raised the issue of whether the drug exhibits were the same as the one seized from him. We agree with the learned DPP that on these failures, the challenge on the identity of the drugs raised in this appeal is misplaced (see *PP v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233). When no doubt existed on the identity of the drugs and where no challenge was made by the appellant, it would not be essential for the prosecution to show how the I.O kept the drug exhibits before sending them to the chemist.

Misdirection

[19] The next ground of appeal raised by the appellant was that the learned trial judge had misdirected himself in appraising the defence of the appellant because the learned judge had relied on the wrong notes of proceedings. The learned judge at p. 184 of his judgment had made a finding that he did not accept the explanation by the appellant as he found in to be a fanciful defence and that the appellant was being inconsistent. In his own words the learned judge held that:

> Mahkamah membuat pendapat untuk tidak menerima penjelasan pembelaan OKT yang adalah fanciful (lihat kes PP hanya berkata dia percaya (trust) akan sepupunya, Ali Reza (muka surat 50 Nota Keterangan), apatah lagi hal penceritaan yang bercanggah mengenai tarikh penerimaan P18 itu sendiri. Mahkamah ini tidak dapat melayani alasan/ penjelasan OKT yang adalah "fanciful" ...

[20] Learned counsel submitted that the finding that the appellant was inconsistent was premised on wrongly recorded notes of proceedings by the trial judge. Learned counsel pointed to us the discrepancy between what was recorded by the learned judge with the recording of the notes in the court recording transcription (CRT). The notes of proceedings as recorded and noted by the learned judge are as follows:

> Ali Reza gave me P18 on 26.08.2010. He asked me to go to his house. He saw my bag was too small and he gave me P18 and I was to collect some clothing in Malaysia and bring back to Iran. Ali Reza asked me to pass my belongings in my bag pack. I trust my cousin. I thereafter went back to my house and on 27.8.2010, I went to bus station in Teheran with Ali Reza and my father. At bus station Ali Reza give me P18. I opened P18 and saw my clothing's in P129.

[21] Whereas, the CRT recording at 10.18am, dated 26 January 2012 on the same as reproduced by learned counsel in rekod rayuan (tambahan) 3 are as follows:

> Q : You inform the court that Ali Reza give you this bag can you inform the court why did Ali Reza give you this bag?
>
> A : The night before I supposed to left Tehran.
>
> Q : The night before is what date?
>
> A : 26.08.2010; he asked me to go to his house. I have a bag pack and when he saw my bag pack, he say it was too small for this job.
>
> Q : What do you mean by this job, can you inform the court?
>
> A : I supposed to collect clothing from someone in Malaysia and bring to Iran.
>
> Q : Then you ask him to continue after Ali Reza said his bag pack was too small for this job.

A : He ask me to pass my belongings to him and I did that because he is my cousin and I trust him. I went back to my house and the day after on 27.08.2010 I went to bus station with my father.

Q : bus station in?

A : bus station in Tehran. I supposed to met Ali Reza at bus station in Tehran.

Q : then what happen after that? He supposed to meet Ali Reza at bus station?

A : Yes I went to bus station at Tehran and I meet Ali Reza and he gave me this luggage bag. I opened the bag and saw my clothing inside the bag.

[22] The discrepancy between these two notes is on when the appellant received P18. According to the judge's notes the appellant received P18 on the night of 26 August 2010 when he visited Ali Reza's house. The CRT recording states that the appellant went to Ali Reza's house on 26 August 2010 and left his back pack and his belongings for Ali Reza to pack because Ali Reza told the appellant then that the back pack was too small. It was the next morning on 27 August 2010 that Ali Reza gave him P18 at Tehran bus station. In evidence the appellant's father (SD3) came to send him off at the bus station. The appellant was taking a bus to Damascus before taking a flight to Kuala Lumpur.

[23] The observation by the learned trial judge when he said "penceritaan yang bercanggah mengenai tarikh penerimaan P18 itu sendiri" was as a result of his reliance on his own notes. It had been demonstrated to us that there are discrepancies between the two notes of proceedings. It was also submitted to us that such discrepancies had caused prejudice to the defence raised by the appellant.

[24] We further note that the learned judge had rejected the appellant's father's evidence (SD3) and had not given credence to it on the reason *inter alia* that SD3 was not with the appellant at Ali Reza's house on 26 August 2010 and therefore did know about P18. It was not the appellant's version that he received P18 on 26 August 2010. The appellant's version was that he received P18 from Ali Reza at the bus station on 27 August 2010 when his father had gone to send him there. Thus again it was not true that at the time P18 was given to the appellant, the father was not there at the Tehran bus station sending him off on 27 August 2010.

[25] Having given our due consideration on the issue raised we found merits in the submission of learned counsel. We have no doubt that there was deliberation of the defence case when the learned judge noted the defence story that he came to Malaysia on some business mission and the various personalities mentioned by the appellant who were responsible in causing him to carry P18 were considered by the learned judge. The names of Ali Reza was found by the learned judge to be a real and not fictitious character,

Rasol Bahrami and Mohamad Behrami are the two characters mentioned by the appellant to be persons who were already in Malaysia to help him on the type of clothing to be purchased for the business, were considered by the learned judge to find the defence of the appellant fanciful. However, the learned judge's treatment of the defence case had been tainted with his finding that the appellant lacked credibility for being inconsistent on a wrong fact because he had relied on the wrong notes of proceedings which we had earlier alluded to in the preceding paragraphs. In our view, a serious misdirection had ensued, for if the learned trial judge had correctly directed himself and had relied on the correct notes of proceedings, he would have looked at the defence case differently.

[26] Lest it be mistaken, in coming to this conclusion we are not making a ruling that the CRT recording is to be given priority over the notes taken by a judge. This inconsistency should have not happened in the first place, had the learned trial judge adhered to the requirement of s. 272 of the Criminal Procedure Code.

[27] Section 272 of the CPC stipulates that a presiding judge is duty bound to note and record evidence including demeanour of witness, if necessary. With the introduction of the electronic CRT s. 272C was introduced to allow mechanical means of recording evidence. For this purpose we reproduce the relevant provisions of the CPC below:

> Electronic record to be transcribed.
>
> 272F. (1) Where any proceedings before any Judge or Magistrate are recorded by any mechanical means, the Judge or Magistrate shall cause the electronic record of such proceedings to be transcribed by any person authorised in writing by the Judge or Magistrate.
>
> (2) Where any person authorised to transcribe under subsection (1) is not a public servant, such person shall be deemed to be a public servant within the meaning of the Penal Code [Act 574] while discharging his duties as such transcriber.
>
> (3) Upon the production of the transcript by any person authorised under subsection (1), the Judge or Magistrate shall ascertain the accuracy and reliability of such transcript and where the Judge or Magistrate makes a ruling that any evidence recorded is inadmissible or irrelevant and shall not form part of the record of proceedings, he may direct that the electronic record of such evidence be excluded from the record of proceedings,
>
> (4) The transcript shall be authenticated by the signature of the Judge or Magistrate.

[28] Under s. 272F the mechanically recorded proceedings may be transcribed by a person authorised by the judge. Once the transcriber produced the record the judge under s. 272F(3) of the CPC, shall ascertain the accuracy and reliability of the transcription by the transcriber. There

A cannot therefore be two different sets of record of proceedings. If the learned judge had abided by the provisions of s. 272F, the present irreconcilable difference in the notes would not have arisen. It is the duty of the learned judge to ensure that the proceedings before him are properly recorded be it by manual process or by mechanical device as in the present case.

B **[29]** In our view the failure of the learned judge to ensure the accuracy of the recording should not be taken lightly, as it had prejudiced the appellant's case in this instance. Such a failure is a breach of the provision under s. 272F of the CPC. When proceedings are recorded by mechanical means as in this case, the trial judge ought to have caused the electronic record of such C proceedings to be transcribed by any person he authorised. Then the judge is duty bound to ascertain the accuracy and reliability of such transcript. If the judge makes a ruling that any evidence recorded is inadmissible or irrelevant and shall not form part of the record of proceedings, he would have to direct that part of the evidence (though recorded) to be excluded from the D record of proceedings. Thus be it by an electronic device or hand written recording the trial judge remains responsible for the accuracy of the notes of proceedings before him.

[30] In the instant appeal it is clear that not only that the learned judge had failed to adhere to the requirement of s. 272F, but we were also informed E by learned counsel that he had difficulties obtaining the CRT recording from the High Court. On 22 January 2014 this appeal though fixed for hearing had to be postponed for the reason that the appellant could not obtain a transcribed record of proceedings. We had then made an order at the request of counsel for the High Court in Shah Alam to prepare a full transcription F of the evidence of SD1.

[31] On the facts and circumstances of this case we are therefore of the considered view that the failure of the learned judge to adhere to the requirement of the provisions of the CPC in handling and ensuring the accuracy of the notes of proceedings had compromised the course of justice G against the appellant and was a misdirection. We are mindful that though a misdirection had occurred, it is not itself a sufficient ground to justify interference with the verdict but we are to consider whether the verdict was erroneous due to that misdirection (*Wong Vui Chin v. PP* [2011] 3 CLJ 383).

[32] In the circumstances, despite sufficient evidence that there was H possession and that knowledge was presumed under s. 37(d), it would not be safe to convict the appellant on the original charge of trafficking with his defence being put in jeopardy. It was for that reason that we find this to be an appropriate case for this court to substitute it with a conviction of possession under s. 39A(2) of the DDA.

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[33] We have taken into consideration the submissions of learned counsel for the appellant and the learned DPP on the sentence to be imposed. Having taken into account the various mitigating factors raised by learned counsel for the appellant and the trend of sentencing as submitted by learned DPP, we are of the view that an imprisonment sentence of 18 years and the minimum ten strokes of whipping would be appropriate.

[34] We therefore allow the appeal in part. We set aside the order of by the High Court and substitute with a conviction on a charge under s. 39A(2)(r) of the DDA. We imposed a sentence of imprisonment of 18 years and together with ten strokes of whipping.